FILED BY CLERK
JUN 29 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TYRONE LITTLE CISCO, Appellant.	)	2 CA-CR 2009-0158 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20071479

Honorable Clark W. Munger, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Stephan J. McCaffery
Tucson
Attorneys for Appellant

E S P I N O S A, Presiding Judge.

¶1 Appellant Tyrone Cisco was convicted after a jury trial of first-degree murder and sentenced to a prison term of natural life. On appeal he contends the trial

court erred when it refused to instruct the jury on the offense of manslaughter. We affirm for the reasons stated below.

¶2 Cisco contends on appeal that the trial court erred when it gave the requested instruction on second-degree murder but refused to give an instruction on the offense of manslaughter, which he characterizes as a lesser degree homicide offense. He first obliquely suggests the court erred in rejecting the argument he had made during the settling of jury instructions that there was sufficient evidence for the jury to find he shot the victim recklessly, during a sudden quarrel, or in the heat of passion. *See* A.R.S. § 13-1103(A)(1), (2). Presumably, therefore, he is asserting the instruction was supported by the same evidence that supported the instruction the court gave for second-degree murder. But the gravamen of his argument on appeal is that he was entitled to the manslaughter instruction because the jury could have found he was guilty of § 13-1103(A)(3), "[i]ntentionally aiding another to commit suicide," and that such an instruction was required whether manslaughter is a lesser-included offense of first- or second-degree murder or simply a lesser degree homicide offense.

¶3 We review a trial court's decision to refuse a jury instruction on a lesser-included offense for an abuse of discretion. *State v. Price*, 218 Ariz. 311, ¶ 21, 183 P.3d 1279, 1284 (App. 2008). We apply the same standard in reviewing the court's decision to give or refuse other instructions as well. *See State v. Martinez*, 218 Ariz. 421, ¶ 49, 189 P.3d 348, 359, *cert. denied*, ___ U.S. ___, 129 S. Ct. 494 (2008). A court must instruct the jury on a lesser-included offense of the crime charged if the evidence supports the instruction. *State v. Vickers*, 159 Ariz. 532, 542, 768 P.2d 1177, 1187 (1989); *see also* Ariz. R. Crim. P. 23.3 (trial court must instruct jury on all offenses "necessarily included in the offense charged"). "[A]n offense is 'necessarily included,'

and so requires that a jury instruction be given, only when it is lesser included *and* the evidence is sufficient to support giving the instruction." *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006); *see also State v. Miranda*, 198 Ariz. 426, ¶ 9, 10 P.3d 1213, 1215 (App. 2000). "In other words, if the facts of the case as presented at trial are such that a jury could reasonably find that only the elements of a lesser offense have been proved, the defendant is entitled to have the judge instruct the jury on the lesser-included offense." *Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150. "[I]t is fundamental error for the trial court to fail to give a lesser-included offense instruction if one is supported by the evidence." *State v. Andriano*, 215 Ariz. 497, ¶ 32, 161 P.3d 540, 547 (2007) (finding no fundamental error in trial court's failure to instruct on lesser-included offenses in first-degree murder case where the instructions were not supported by the evidence).

¶4 The state contends Cisco abandoned, by not adequately developing on appeal, any argument that the trial court erred in refusing the manslaughter instruction on the bases Cisco had argued below, which were recklessness or sudden quarrel or heat of passion, pursuant to § 13-1103(A)(1), (2). But even assuming Cisco's brief mention of this issue in his opening brief was sufficient to present it for appellate review, he has established no error.[1] Whether manslaughter based on recklessness or sudden quarrel or heat of passion is a true lesser-included offense of murder, *see State v. Garcia*, 220 Ariz. 49, ¶ 4, 202 P.3d 514, 515-16 (App. 2008), or simply a lesser-degree of homicide, as Cisco characterizes it, Cisco has not established grounds for reversal. There was essentially no evidence to support his theory that the shooting had been committed as the result of recklessness or upon a sudden quarrel or heat of passion.

[1]Moreover, nothing Cisco suggests as error could be characterized as anything but harmless error, in light of other evidence presented at trial.

¶5 Cisco's primary defense was that the victim's former husband, not Cisco, had committed the offense. During only a very brief portion of defense counsel's closing argument did he allude to second-degree murder as a possible verdict, arguing that the fact the victim had been shot five times suggested the person had acted with anger, committing a crime of passion, rather than premeditated murder. Additionally, "[w]here the jury is instructed on both first- and second-degree murder and returns a first-degree murder conviction, there is no prejudice for failure to instruct on manslaughter." *State v. Tucker*, 157 Ariz. 433, 447, 759 P.2d 579, 593 (1988).

¶6 Cisco's argument that the court erred in rejecting the manslaughter instruction because he could have been aiding the victim in a suicide was never presented to the trial court. He has therefore forfeited the right to appellate relief for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005); *see also State v. Whittle*, 156 Ariz. 405, 406-07, 752 P.2d 494, 495-96 (1988). Although failure to instruct a jury on all lesser-included offenses can constitute fundamental error, "[m]anslaughter by aiding a suicide is not . . . a lesser-included offense of first-degree murder." *State v. Khoshbin*, 166 Ariz. 570, 573, 804 P.2d 103, 106 (App. 1990).

¶7 Nor has Cisco persuaded us the omission of such an instruction was nevertheless fundamental error on the ground a defendant is entitled to an instruction on all lesser degrees of homicide offenses. Whether an offense is a lesser offense or lesser-included offense, the trial court is only required to give a jury instruction if there is reasonable evidence to support it. *See State v. Ruelas*, 165 Ariz. 326, 328, 798 P.2d 1335, 1337 (App. 1990) (defendant entitled to instruction "on all grades of homicide that are reasonably supported by the evidence"). Again, Cisco never relied on this subsection

of the manslaughter statute and never presented evidence suggesting he had assisted the victim in committing suicide.

¶8 Fundamental error is error that takes from a defendant a right essential to his or her defense or is "error of such magnitude that the defendant could not possibly have received a fair trial." *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. It "interferes with defendant's ability to conduct his defense." *Whittle*, 156 Ariz. at 407, 752 P.2d at 496. Because Cisco never asserted or even suggested that assisted suicide was a possible defense, and because there was virtually no evidence to support such an instruction, the court did not err at all, much less fundamentally, in not sua sponte giving a manslaughter instruction based on assisted suicide.

¶9 The conviction and sentence imposed are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge